No. 14

IN THE

Supreme Court of the United States

October Term, 1944

R. J. THOMAS,
Appellant

v.

H. W. COLLINS, SHERIFF OF TRAVIS COUNTY, TEXAS,
Appellee

Appeal from the Supreme Court of Texas

BRIEF OF APPELLEE ON QUESTIONS PROPOUNDED FOR REARGUMENT

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In addition to the brief that Appellee heretofore filed in this case as cause No. 569 at the last term of court, Appellee herewith submits this brief covering

each of the six questions propounded by the Court to counsel for discussion on the reargument of this case.

QUESTION NO. 1:

> "Does the Texas Act, by judicial or administrative construction, require a registration or license before making the speech made by Thomas—if it had omitted the O'Sullivan solicitation?"

COMMENT:

The Act in question, (Section 5 of Article 5154a, Vernon's Annotated Texas Civil Statutes) does not prohibit speech making as such. It prohibits a paid labor organizer who has not registered with the Secretary of State from "soliciting any members for his organization." It is the solicitation without registration that constitutes the offense defined in the Act. The Act, of course, applies even though a speech may be the vehicle of solicitation. This does not mean that the statute prohibits a general speech in favor of joining a union. The Act prohibits only definite solicitation before registration. If such definite, specific solicitation takes place even in the course of a speech, the Act is violated.

It is our view that Section 5 of the Act has not been enlarged or extended by administrative or judicial construction. The administrative construction is set forth in paragraphs 9 and 10 of an instrument entitled Policies of State Department Admin-

istration of House Bill 100, 48th Legislature, which appears in the record as Defendant's Exhibit No. 1 (R. 13, 74). This construction of Section 5 of the Act goes no farther than the statute itself.

The judicial construction given Section 5 of the Act by the Supreme Court of Texas and the District Court of Travis County in this case does not extend or enlarge the statute. The Supreme Court of Texas did not enlarge the statute by judicial construction. In its opinion that court said:

> "Relator's counsel in his argument before this court conceded the existence of the necessary factual basis for the judgment in the contempt proceedings. His only contention is that said Section 5 of the Act violates the provisions of Article I, Section 8, of the State Constitution, Vernon's Ann. St. which prohibits the enactment of any law abridging or curtailing the right of freedom of speech, and Article XIV, Section 1, of the Federal Constitution, which prohibits a state from enacting any law abridging the privileges and immunities of a citizen of the United States or depriving any person of his liberty." Ex Parte Thomas, 141 Tex. 591, 174 S. W. (2d) 958, 960.

There is no way to determine from this record that the District Court considered the Thomas speech a violation of the temporary restraining order. The speech was introduced in evidence by appellant. (R. 41,279). The hearing in the District Court was "on the application of the plaintiff for a temporary injunction" (R. 45) as well as "on motion for con-

tempt." (R. 1). The temporary injunction was granted simultaneously with the judgment for contempt and on the same record. (R. 303, 308). Neither of these order was appealed from (See Ex. parte, Travis 123 Tex. 480, 73 S. W. (2d) 487, *Harbison* v. *McMurray*, 138 Tex. 192, 158 S. W. (2d) 284), but the entire record was nevertheless filed in the Supreme Court of Texas in a collateral attack on on the judgment for contempt.

It is true that the motion for contempt sets out the acts of appellant, which were alleged to be in violation of the Court's order, in two separately numbered paragraphs. (R. 297, 298). The judgment in contempt, however, is a general judgment of guilty. (R. 308, 309). In a habeas corpus proceeding under such a record the judgment of guilty is referable to the first paragraph of the complaint (R. 297) alleging the O'Sullivan solicitation, which appellant himself admitted was a violation of the statute (R. 41) and the second paragraph alleging the Thomas speech will be disregarded, if it is considered to be defective. *Dimmick* v. *Tompkins*, 194 U. S. 540, 551, *Snyder* v. *United States*, 112 U. S. 216, *Claassen* v. *United States*, 142 U. S. 140, 146, 147. *Tinsley* v. *Anderson*, 171 U. S. 101, 107.

But if we assume that the judgment in contempt rests on the Thomas speech, we still say that it is a valid judgment. In *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, this court had before it the same question. The company

there contended that the Board's findings that certain utterances constituted an unfair labor practice violated its rights guaranteed by the First Amendment. This Court said:

> "The mere fact that language merges into a course of conduct does not put the whole course without the range of otherwise applicable administrative power." 314 U. S. p. 478.

In *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 437, 438, this Court said:

> "But whatever the requirements of the particular jurisdiction, as to the conditions on which the injunction against a boycott may issue; when these facts exist, the strong current of authority is that the publication and use of letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount to a violation of the order of injunction. Reynolds v. Davis, 198 Massachusetts, 300; Sherry v. Perkins, 147 Massachusetts, 212; Codman v. Crocker, 203 Massachusetts, 150; Brown v. Jacobs, 115 Georgia, 452, 431; Gray v. Council, 91 Minnesota, 171; Lehse Co. v. Fuelle, 215 Missouri, 421, 472; Thomas v. Railroad Co., 62 Fed. Rep. 803, 821; Continental Co. v. Board of Underwriters, 67 Fed. Rep. 310; Beck v. Teamsters' Union, 118 Michigan, 527; Pratt Food Co. v. Bird, 148 Michigan, 632; Barr v. Essex, 53 N. J. Eq. 102. See also Ludwig v. Western Union Telegraph Co., 216 U. S. 156; Bitterman v. L. & N. R. R., 207 U. S. 206; Board of Trade v. Christie, 198 U. S. 236; Scully v. Bird, 209 U. S. 489."

State laws prohibiting solicitation have been upheld even though the soliciting was carried on entirely by "speech" (*Williams* v. *Arkansas*, 217 U. S. 79) or by publication of advertisements. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608. Practicing law necessarily involves speech making but that does not give an unlicensed man the right to practice law—not even that part of the practice which constitutes no more than speech making.

The basic issue is whether or not a State under its police power may require persons engaged as paid professionals in the business of organizing employees into labor unions to register with the Secretary of State before engaging in such business in that State. We submit that this question has been answered in the affirmative by *City of Manchester* v. *Leiby* (1 Cir) 117 Fed. (2) 661, certiorari denied, 313 U. S. 562. That labor unions are separate functional institutions engaged "in a multitude of business and other concerted activities, none of which can be said to be the private undertakings of the members" is a fact of which this Court has recently taken judicial notice. *United States of America* v. *White*, 88 L. Ed. 1149, 1153. A state regulation requiring a paid professional representative of these big businesses to in effect do no more than leave his calling card with the Secretary of State when he comes into a state to engage in an "institutional activity" is clearly within the State's police power. *People of the State of New York ex rel Bryant* v. *Zimmerman*, 278 U. S. 63.

QUESTION NO. 2:

> "Did the injunction forbid the speech (apart from the O'Sullivan solicitation) and is the order of contempt based in whole or in part on such speech? If not, is the speech used as an aggravation of the offense ? If neither what is the purpose and effect of its recital in the papers and orders in this proceeding?"

COMMENT:

The temporary restraining order (R. 294, 315) did not "forbid the speech." The order of contempt (R. 308, 309) is not based in whole or in part on such speech. The speech is not "used" as an aggravation of the offense. The offense was solicitation before being registered. The appellant used "speech" in connection with other acts and circumstances in order to violate the temporary restraining order, but speech making, as such, is not the gravamen of the offense.

We have pointed out above that the only "speech" directly involved was the O'Sullivan solicitation. As far as the present inquiry is concerned the "Thomas Speech" has neither purpose nor effect. *Allen* v. *United States*, 278 Fed. 429. The sufficiency of the evidence cannot be inquired into in this collateral proceeding. Ex parte Lipscomb, 111 Tex. 409, 239 S. W. 1101. Ex parte Olson, 111 Tex. 601, 243 S. W. 773, Ex parte Terry, 128 U. S. 289, 305, *Howat* v. *Kansas*, 258 U. S. 181, 189, 190. It is well settled under Texas practice that in a civil case

tried without a jury in the absence of findings of fact (See Rule 299, Texas Rules of Civil Procedure), it will be presumed in support of the judgment rendered that the court considered the competent and disregarded the incompetent evidence in reaching its judgment. *Keith Lumber Co.* v. *Houston Oil Co. of Texas*, 257 Fed. 1, 168 C.C.A. 213, certiorari denied, 250 U. S. 666, *Cates* v. *Clark*, 119 Tex. 519, 33 S. W. (2) 1065, *Lewis* v. *Perry & Co. Ins.* (Tex. Civ. App) 42 S.W. (2) 1038.

QUESTION NO. 3:

> "Assuming the speech to be immune and assuming the words addressed to O'Sullivan to be a violation of a valid prohibition of solicitation, what is the effect on its constitutional validity of including both in one injunction?"

COMMENT:

The injunction (temporary restraining order) does not include the speech. It prohibited solicitation before registration and nothing more. It was no broader than the statute itself.

It is necessary to construe the language of the contempt judgment which recites that "R. J. Thomas is guilty of contempt of this Court *as charged in the information*" (R. 309) as a separate finding on each of the two paragraphs alleged in the motion for contempt (R. 297, 298) in order to answer this question. This is a strained construction because the

judgment would have referred to the two counts separately, if there had been any intention to make a distinction between them. This question was not raised, of course, by appellant in the Supreme Court of Texas nor in this Court upon the original presentation of this case. It cannot be raised in this proceeding which constitutes a collateral attack on the the contempt judgment because the error, if any, arises not through lack of jurisdiction but by reason of its exercise. If the District Court had jurisdiction of appellant and the subject matter of the injunction suit, the contempt judgment is valid and cannot be set aside in this habeas corpus proceeding. *Tinsley* v. *Anderson*, 171 U. S. 101, 107, *Locke* v. *United States*, (5 Cir) 75 Fed. (2) 157, certiorari denied, 295 U. S. 733, and In re Duncan, 139 U. S. 449.

There is no merit, however, in the contention. The exact question was raised and decided by this court in *Dimmick* v. *Tompkins*, 194 U. S. 540, 551. In that case the appellant in a habeas corpus proceeding was attacking a judgment of a circuit court under which he was sentenced "at hard labor for two years" . . . "in the State prison of the State of California, at San Quentin." The single penalty was based on two counts in the indictment, the first for "making and presenting a false claim" and the fourth for "using a portion of the public moneys of the United States for a purpose not prescribed by law." The appellant was found guilty on both counts and he contended that the single sentence of two

years should be construed as being based on both counts with a penalty of one year for each conviction. Since the Federal statute authorized imprisonment in the State prison only where the sentence was for a longer period than one year, it was contended that the sentence was void. In overruling the contention, this Court said:

> "It is also objected that the sentence is void because it directs imprisonment in the state prison for a period that does not exceed one year on each count of the indictment, and In re Mills, 135 U. S. 263, 268, is cited to sustain the proposition. In that case the prisoner was sentenced upon two indictments to imprisonment in the penitentiary, in one case for a year and in the other for six months, and it was held that the imprisonment was in violation of the statutes of the United States. See Rev. Stat. Secs. 5541, 5546, 5547.
>
> "In the case at bar the sentence was for two years upon one indictment, and there is no statement in the record that there was a separate sentence each for one year upon the first and fourth counts of the indictment. In this we think there was no violation of the statute, and the sentence was therefore proper and legal. The appellant may have been sentenced upon one count only for two years. Although for some purposes the different counts in an indictment may be regarded as so far separate as to be in effect two different indictments, yet it is not true necessarily and in all cases. But this record shows a sentence for two years to the state prison, and there is nothing to show the

court was without jurisdiction to impose such sentence for the crime of which the defendant was convicted."

In the present case there is nothing to show that appellant was not sentenced on the first paragraph in the motion for contempt (the O'Sullivan solicitation) for the full statutory penalty. Article 1911, R. S. of Texas, 1925, limited the punishment for a single contempt to "imprisonment not exceeding three days" and "by fine not exceeding one hundred dollars." Since the contempt judgment imposed only the maximum statutory penalty for one offense, it cannot be said that the District Court considered the two paragraphs in the motion for contempt as charging two offenses or that the contempt judgment covered more than one offense. See, also, *Snyder* v. *United States*, 112 U. S. 216, *Claassen* v. *United States*, 142 U. S. 140, 146, 147.

The Supreme Court of Texas has recently held that "a habeas corpus proceeding is a civil remedy, as distinguished from a criminal remedy or proceeding, and that whether the prisoner is detained under civil or criminal process." *Harbison* v. *McMurray*, 138 Tex. 192, 158 S. W. (2) 284, 287. Section 12 of Article 5154a, which authorizes the District Courts and the Judges thereof "to issue any and all proper restraining orders, temporary and pemanent injunctions, and any other and further writs or processes appropriate to carry out and enforce the provisions of this Act" also provides that "such proceedings shall be instituted, prosecuted,

tried and heard as other civil proceedings of like nature in said courts." In civil cases of injunction, all presumptions are in favor of the validity of the judgment when subjected to a collateral attack by a habeas corpus proceeding and a contempt judgment based thereon will be upheld unless the Court issuing the injunction had no jurisdiction and the injunction was wholly void. *Tinsley* v. *Anderson*, 171 U. S. 101, 1[illegible], *Howat* v. *Kansas*, 258 U. S. 180, 189, 190, *Locke* v. *United States*, (5 Cir.) 75 Fed. (2) 157, certiorari denied, 295 U. S. 733, *Fansteel M. Corp.* v. *Amalgamated Ass'n Iron, Steel & Tin Workers*, 295 Ill. App. 323, 14 N. E. (2) 991 certiorari denied, 306 U. S. 642. Ex Parte Testard, 101 Tex. 250, 253, 106 S. W. 319, Ex parte Olson, 111 Tex. 601, 611, 243 S. W. 773, Ex parte Kimberlin, 126 Tex. 60, 65, 66, 86 S. W. (2d) 717, Ex parte Lee, 127 Tex. 256, 266, 93 S. W. (2d) 720, Ex parte Duncan, 127 Tex. 507, 95 S. W. (2d) 675.

QUESTION NO. 4:

> "Assuming the injunction invalid as applied to the speech, what was the duty of Thomas in respect of obedience so long as it was not set aside?"

COMMENT:

It was the duty of Thomas to obey the injunction so long as it was not set aside, even if it was invalid as applied to the speech. We concede that if Sec-

tion 5 of Article 5154a is unconstitutional as enacted, that the District Court of Travis County, Texas, for the 53rd Judicial District, which entered the temporary restraining order, had no jurisdiction of the subject matter. The District Court of Travis County is a constitutional court of general jurisdiction (Section 8, Article V, Texas Constitution) but it had no general jurisdiction to enjoin appellant merely because his acts would constitute a crime or penal offense or to punish appellant for contempt for violating a void order. Ex parte Hughes, 133 Tex. 505, 129 S. W. (2) 270. Section 12 of said Article 5154a is the source of the District Court's jurisdiction in this case but if Section 5 of that Article is unconstitutional, the Court would have no power to enforce obedience to it by issuing an injunction as authorized in Section 12.

If the temporary restraining order is invalid only in so far as it is applied to the speech and when applied to the O'Sullivan solicitation it is valid, the appellant cannot raise the question of its partial invalidity in this appeal, which constitutes a collateral attack on the contempt judgment. Ex parte Testard, 101 Tex. 250, 253, 106 S. W. 319, *Tinsley* v. *Anderson*, 171 U. S. 101, 106 and other cases cited at end of comment on Question No. 3.

QUESTION NO. 5:

> "Is the application made of Section 5 consistent with the provisions of the National Labor Relations Act?"

COMMENT:

The application of Section 5 of Article 5154a in this proceeding is consistent with the provisions of the National Labor Relations Act. *N.L.R.B.* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, *Allen-Bradley Local* v. *Wisconsin Employment Relations Bd.*, 315 U. S. 740, *Terminal Ry. Association of St. Louis* v. *Brotherhood of R. R. Trainmen*, 318 U. S. 1, *Fansteel M. Corp.* v. *Amalgamated Ass'n Iron, Steel & Tin Workers*, 295 Ill. App. 323, 14 N. E. (2) 991 certiorari denied, 306 U. S. 642. *Wisconsin Labor Relations Board* v. *Fred Rueping Leather Co.*, 228 Wisc. 473, 279 N. W. 673.

The validity of the National Labor Relations Act was upheld on the theory that it did not violate the "explicit reservations of the Tenth Amendment." *Jones & Laughlin case, supra.* In that case this Court said:

> "The authority of the Federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system." 301 U. S. p. 30.

The labor unions raised this question in the case of *Allen-Bradley Local* v. *Wisconsin Employment Relations Bd., supra*, where they were challenging

the Wisconsin Employment Peace Act on the ground that as enacted and as applied it violated the National Labor Relations Act. The Wisconsin Act sets up State machinery to settle labor disputes comparable to the National Labor Relations Board. It was admitted that the employee in that case was also subject to the National Labor Relations Act. This Court held, however, that the mere enactment of the National Labor Relations Act does not exclude state regulation. This court said:

> " . . . Nor can we say that the control which Congress has asserted over the subject matter of labor disputes is so prevasive (Cf. Cloverleaf Butter Co. v. Patterson, ante, p. 148) as to prevent Wisconsin, under the familiar rule of Pennsylvania R. Co. v. Public Service Comm'n, 250 U. S. 566, 569, from supplementing federal regulation in the manner of this order. Sec. 7 of the federal Act guarantees labor its 'fundamental right' (Labor Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 33) to self-organization and collective bargaining. Sec. 8 affords employees protection against unfair labor practices of employers including employer interference with the rights secured by Sec. 7. Sec. 9 affords machinery for providing appropriate collective bargaining units. And Sec. 10 grants the federal Board 'exclusive' power of enforcement. It is not sufficient, however, to show that the state Act might be so construed and applied as to dilute, impair, or defeat those rights. Watson v. Buck, supra. Nor is the unconstitutionality of the provisions of the State Act which underlie the present order established by a showing that other parts of the statute are incompat-

ible with and hostile to the policy expressed in the federal Act. Since Wisconsin has applied to appellants only parts of the state Act, the conflict with the policy or mandate of the federal Act must be found in those parts." 315 U. S. 750.

The Act in question, of course, does not deal with labor disputes as such and there has been no possible conflict between it and the National Act suggested in the evidence or by the briefs. Section 5 of the Act, as enacted and as applied in this case, is not inconsistent with the National Labor Relations Act. *Terminal Ry. Ass'n. of St. L.* v. *Brotherhood of R. R. Trainmen*, 318 U. S. 1.

QUESTION NO. 6:

"Assuming that petitioner had a constitutional right to make a general argument and solicitation to the entire assembly of workers, could the state punish him in a single penalty because he picked out one member of the assembly and addressed a solicitation to him by name?"

COMMENT:

If Section 5 of Article 5154a, which prohibits solicitation by paid labor organizers before registration is constitutional, the temporary restraining order which follows the statute is constitutional and the punishment of appellant for his admitted violation of the order through his solicitation of Pat O'Sullivan (R. 41) is likewise constitutional. (See,

cases cited on p. 12, supra.) The fact that appellant may have done other things which he had a constitutional right to do does not mitigate his contempt of the court in admittedly doing what the court had previously forbidden him to do, viz., soliciting members for a labor union prior to his registration with the Secretary of State. (See, cases cited on p. 4, supra.) The ultimate issue, therefore, is whether or not Sections 5 and 2-C of the Texas Act, as enacted, are constitutional. We submit that this is a valid regulation and that the judgment appealed from for that reason should be affirmed.

Respectfully submitted,

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